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## Antitrust Review of Recent Gaming Industry M&A Activity

The video-game industry is facing a rapid wave of M&A activity as major competitors attempt to consolidate with smaller players and vertically integrate within the industry.<sup>1</sup> Since the start of 2022 the industry has already seen the largest acquisition in video-game history with Microsoft's planned \$69 billion acquisition of Activision Blizzard, as well as a possible reactionary acquisition by Sony of the top tier creator studio Bungie for \$3.6 billion, all following a busy year in 2021 with \$38 billion in gaming deals.<sup>2</sup>

Though the video-game industry has matured into one of the world's largest media industries, it has thus far escaped the regulatory antitrust scrutiny recently focused on Big Tech players over how acquisitions and other business practices affect the competitive market.<sup>3</sup> Furthermore, the type of vertical mergers presented by the Microsoft-Activision and Sony-Bungie deals are not new for the industry; Microsoft has completed many such mergers in recent years, and there is a convincing argument that video game platforms and publishers (e.g., Microsoft) can provide the capital necessary for development houses (e.g., Activision Blizzard) to create more competitive products.<sup>4</sup>

However, due to the consolidated nature of the gaming industry at the platform level, these types of deals may begin to face renewed antitrust scrutiny insofar as they threaten consumer choice.<sup>5</sup> While Microsoft's acquisition purports to focus on improving its gaming-as-a-service subscription offering, and its investment into mobile gaming, regulators rightfully worry about the tech giant's ability to confine certain content (such as the best-in-class Call of Duty franchise) to its platform. To its credit, Microsoft immediately disclosed its impetus for the deal, rejected claims of restricting content, and welcomed any antitrust review from the FTC and DOJ.<sup>6</sup> The company even announced a set of "Open App Store Principles" shortly after the announcement of the acquisition, in an apparent effort to alleviate regulatory concerns and possibly to divert some scrutiny to other Big Tech players who have less liberal online marketplace policies.<sup>7</sup>

Regulators may struggle to define how these deals stifle competition in a fragmented gaming industry.<sup>8</sup> Antitrust review often focuses on different aspects of specific markets, and how competition may be affected in each layer of the industry.<sup>9</sup> For example, gaming could be

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<sup>1</sup> Peter Allen Clark, *Gaming is Antitrust Regulators' Blind Spot*, AXIOS (Feb. 10, 2022), <https://www.axios.com/gaming-antitrust-regulators-blind-spot-ca7bdf4-4433-48df-91d8-0108acd8b1f2.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Ashley Gold, *Microsoft Proclaims Support For a More Open Gaming Future*, AXIOS (Feb. 9, 2022), <https://www.axios.com/microsoft-activision-gaming-open-markets-act-3afe4296-342e-4a26-80ad-a067d0ad8b0c.html>.

<sup>7</sup> *Id.*

<sup>8</sup> See Clark, *supra* note 1.

<sup>9</sup> *Id.*

considered as one single large market, a few markets based on platforms (i.e., console, PC, mobile), or even more fragmented markets based on development type or genre.<sup>10</sup> Thus, the outcome of antitrust scrutiny in the gaming industry is unlikely to be known until the government fleshes out its case. In the case of the Microsoft-Activision deal, the deal document itself allows 18 months until closing, signaling anticipation of extended regulatory review.<sup>11</sup> Anecdotally, options market pricing implied just under a 60% chance of the deal closing, based on Activision's closing share price of \$65.39 before the deal was announced.<sup>12</sup>

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**Summary: Recent M&A activity in the gaming industry presents new antitrust questions for regulators at the FTC and DOJ eager to review competitive practices in tech-adjacent industries. The headline-grabbing Microsoft deal for Activision Blizzard further presents an immediate battle ground to analyze the propriety of gaming consolidation under antitrust principles.**

Hank Strohm is from Portola Valley, CA, and is interested in corporate transactional work. He plans to begin his legal career in New York City after graduation.

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<sup>10</sup> *Id.*

<sup>11</sup> Agreement and Plan of Merger, Microsoft Corporation and Activision Blizzard Inc., [https://www.sec.gov/Archives/edgar/data/718877/000110465922005154/tm223212d3\\_ex2-1.htm](https://www.sec.gov/Archives/edgar/data/718877/000110465922005154/tm223212d3_ex2-1.htm).

<sup>12</sup> Svea Herbst-Bayliss, *Microsoft-Activision Deal Gives Merger Speculators a New Darling*, REUTERS (Jan. 20, 2022), [reuters.com/markets/europe/microsoft-activision-deal-gives-merger-speculators-new-darling-2022-01-20/](https://reuters.com/markets/europe/microsoft-activision-deal-gives-merger-speculators-new-darling-2022-01-20/).